UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ELECTROLUX HOME PRODUCTS, INC.

and **Case 15-CA-206187**

J'VADA MASON, an Individual

Linda M. Mohns, Esq., for the General Counsel.
Reyburn W. Lominack, III and Stephen C. Mitchell, Esqs. (Fisher and Phillips LLP) Columbia, South Carolina, for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Memphis, Tennessee on May 7-9, 2018. J'Vada Mason filed the initial charge in this case on September 14, 2017. The General Counsel issued the complaint on December 20, 2017.

Respondent, Electrolux Home Products, discharged the Charging Party, J'Vada Mason on May 5, 2017. The General Counsel alleges that in doing so Respondent was motivated at least in part by Mason's union and other protected activities. Thus, he alleges that Respondent violated Section 8(a)(3) and (1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, manufactures ovens at its facility in Memphis, Tennessee, where it annually sells and ships, and purchases and receives goods valued in excess of $50.000 directly to and from points outside of Tennessee. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 474 of the International

Brotherhood of Electrical Workers (IBEW), which represented J'vada Mason during her employment with Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent opened the facility in question in Memphis in 2013. It now employs over 700 bargaining unit workers at this facility where it produces gas and electric ovens. Respondent hired J'Vada Mason in April 2013 and within 2 months promoted her to the position of team lead in the materials department. At all times relevant to this case, Mason was the materials team lead for assembly line 2. The materials department's function is to keep the assembly lines stocked with materials needed for production. During the five years Mason worked for Respondent she received one performance evaluation. That occurred in 2014 and was positive. She had been disciplined twice; once in 2013 for improperly clocking in, for which she was suspended for 3 days, and once for failing to properly scan an item taken from inventory in December 2016, for which she was verbally counseled a month later.[1]

The IBEW attempted to organize the facility in 2015, but lost a representation election. It had another organizing drive in 2016. This one was successful. On October 5, 2016, the Union was certified as the exclusive bargaining representative of all regular full-time production, maintenance, quality, shipping and receiving, and materials handling employees at Respondent's main plant and a warehouse in Memphis,. On October 20, 2016, Respondent and the Union reached an interim agreement regarding employee discipline as follows:

> For terminations, suspensions without pay and disciplinary demotion, the company will send relevant paperwork to the Union by email and wait 3 business days to allow bargaining if requested. The action will be taken after 3 days but bargaining can continue if necessary. Terminations involving workplace violence, weapons, drugs and other serious violations can result in immediate suspension while the 3 day period runs.

R. Exh. 6.

J'Vada Mason distributed authorization cards, handed out union flyers and wore a pro-union T-shirt during both organizing campaigns. At a mandatory meeting approximately 1 week prior to the second election, Mason sat in the front row and attempted to respond to statements by plant manager Sebastian Gulka. She was not allowed to do so, but stood up and challenged Gulka's statements regarding strikes at Kellogg's Memphis plant. Mason has family members who worked at Kellogg's. Both

[1] Respondent argues at pages 45-46 of its brief that the fact that it did not fire Mason in January shows that her discharge had nothing to do with her union activity. However, R. Exh. 5 shows that Respondent would have had to terminate 10 other employees for the same offense to prove that Mason was not being terminated disparately. Her offense, which occurred in December 2016, would have been very difficult to justify as a legitimate non-discriminatory basis for a discharge.

Gulka and a manager named Matt told Mason to shut up because she didn't know what she was talking about.[2]

On January 13, 2017, the Union identified 6 unit employees, including Mason, who would serve on its negotiating team in collective bargaining negotiations. Mason attended the negotiations which commenced in January. The parties met 1 week per month; 3 days per week. At a session in March or April 2017 the Union and Respondent participated in a sidebar discussion concerning a complaint Mason had about her supervisor, John "Chris" Fair.

Respondent hired Fair in October 2016 and it appears that friction between Mason and Fair started almost from the beginning of his employment. On or about February 25, 2017, an assembly team lead for line 2 posted a bathroom sign-up sheet on her cubicle. Respondent's managers quickly ordered that the team lead take the sign-up sheet down. Mason and Fair had a discussion about this event. According to Mason, Fair told her something to the effect that if anything like that happened again he would lie and implicate Mason to avoid being disciplined himself. Fair's version is as follows:

> And I told J'Vada, I said if you make that decision, you're going to eat that one, because I ain't—I'm not—you know, John [Collins] is a different kind of guy than me and I'm not going to take up for you on that. You're going to get that one. You're going to be on your own, because there's some things you cannot do. And that's one of them.

Tr. 336.[3]

Mason went to the human resources department and complained that Fair told her that he would "lie on her" to save his job.

The events of April 28, 2017

Mason's shift began at 6:00 a.m. On the morning of Friday, April 28, 2017, the two forklift drivers assigned to assembly line 2 on her shift were off work taking FMLA leave. Fair, who was the supervisor for the materials department for all 7 or 8 production lines,[4] approached Mason, who was materials team lead responsible to assembly line 2.

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[2] Mason's testimony about what occurred at this meeting is uncontradicted and therefore credited. Both briefs state that Gulka was no longer the plant manager in May 2018 when this trial occurred. There is no evidence as to that fact in the record. Respondent did not call Gulka as a witness or explain why it could not call him.

[3] John Collins was the supervisor for assembly line employees on line 2. It was one of his team leads that posted the bathroom log. I do not need to resolve the disparate testimony about this event because it is irrelevant to the disposition of this case. Fair left Respondent to take a job with a different employer in October 2017. Respondent subpoenaed Fair to testify in this proceeding.

[4] Lines 1-4 assemble electric ovens; the others assemble gas ovens. Line 1assembles single-wall ovens; line 2 assembles double-wall ovens.

Fair asked Mason to take some microwaves to assembly line 2.[5] She did not do so.[6] Sometime later, Fair approached Mason at her work station with the assembly line supervisor for line 1, Hamza Huqq.[7] Huqq told Mason that his line needed materials. However, Mason was not responsible for delivering materials to line 1 and Fair did not tell her to deliver materials to line 1. At about 10:00 production on the assembly line 2 and possibly 1 stopped for reasons unrelated to the delivery of microwave ovens to line 2 or anything that Mason did or did not do.

Fair complained to Human Resources Business Partner Diana Jarrett about Mason. Jarrett conducted a meeting regarding this complaint later that day. Jarrett had Fair submit a written statement about the events of that morning. He also obtained statements for Jarrett from Hamza Huqq, Candace Cox, an acting team lead on line 2, and John Collins, the assembly supervisor for line 2.[8] At the meeting Jarrett suggested that Mason submit a written statement. Stanley Reese, the Union's chief steward, who was in attendance, advised Mason not to do so. Neither Jarrett, nor any other company official said anything to Mason as to the consequences of her conduct. Jarrett did, however, prepare a termination recommendation presumably on April 28, G.C. Exh. 5. That document was never presented to Mason either before or after her termination on May 5.

April 28-May 5, 2017

At the end of the meeting Mason returned to work and continued to work without incident until Friday, May 5. On or about May 1, Jonathan Pearson, Respondent's lead negotiator in the collective bargaining negotiations, emailed Paul Shaffer, IBEW Local

[5] Fair's testimony is unclear as to whether he asked Mason to deliver anything other than microwaves to line 2. I find that is all he asked her to do. His statement and that of John Collins indicated that his requests/orders to Mason only involved the microwaves for line 2.

[6] Fair testified that if Mason couldn't deliver the microwaves herself, she should have asked someone else to do so. There is no other evidence he told Mason that. I find that Fair was insisting that Mason personally deliver the microwaves. There is a lot of conflicting testimony regarding the details of what transpired on April 28. I do not fully credit Mason's testimony because it is self-serving. I do not fully credit Fair's because it is very confusing and at times inconsistent. For example, Fair's testimony at Tr. 354 and his April 28, 2017 statement suggest that Fair asked Mason to deliver microwaves to line 2 after he knew that they were being delivered by another employee. Thus, my factual finding as to what occurred on April 28 is limited to the following: Fair asked Mason to deliver microwaves to line 2 on at least one occasion and she did not do it.

[7] It is unclear what Huqq, who testified in this proceeding, has to do with this case. He spoke to Mason in a very agitated fashion because he was missing some parts he needed on line 1. It is unclear whether this had anything to do with Fair's request that Mason deliver microwaves to line 2. Fair's statement in G.C. 11, indicates that Fair only asked Mason to deliver to line 2. Huqq did not know who was the materials team lead for line 1 and was unfamiliar with James Allen who held that position.

[8] Fair and Huqq testified in this proceeding; Collins and Cox did not. Huqq's testimony is inconsistent with that of Fair. It was also obvious that he remembered very little of what occurred on April 28. I regard his testimony to have absolutely no probative value regarding any issues in this case. However, I would note that Huqq did not remember production on assembly line 1 stopping on April 28, Tr. 422.

474's business manager.[9] In the email, Pearson informed Shaffer that Mason was being investigated for insubordination. Attached to Pearson's email were the statements given to Jarrett and the proposed discipline, Tr. 25-26.[10] On May 3, Shaffer spoke with Pearson over the telephone. Pearson informed Shaffer that he did not have a statement from Mason. Afterwards, Shaffer called Mason.

Shaffer told Mason that Respondent was talking about terminating her for insubordination and the she should submit a statement to Respondent. Mason submitted her statement to Diana Jarrett on the morning of Thursday, May 4, G.C. Exh. 6.

Mason went to the human resources office to change a leave request for May 5 from a full day to a half day at about 10:55 a.m., almost three hours after she reported to work, R. Exh. 3. Leola Roberts, Respondent's human resources director at the time,[11] summoned Mason into a meeting that lasted less than 10 minutes and informed her that Respondent was terminating her for insubordination.[12]Mason's separation notice was prepared on May 5 and was signed by Roberts that day, G.C. Exh. 7. Roberts testified she conducted the termination meeting only because Jarrett was not at the facility on May 5. Roberts appears to have learned that Respondent was terminating Mason on May 5. If she or Jarrett knew that for certain before May 5, it is unlikely that Mason would have been allowed to work that day.

The evidence as to the procedure by which Respondent decided to terminate Mason is as follows: Jarrett testified that she did an investigation, met with Roberts and recommended that Mason be terminated because Mason disrupted its operations. I do not credit her testimony. There is no credible evidence that Mason's insubordination disrupted Respondent's operations in any material way. Moreover, Jarrett's testimony with regard to her conversation with Roberts is particularly incredible. Jarrett testified:

> So I had the discussion with Leola, and she always asks for my feedback. And I, you know, told her, you know, even after talking with J'Vada—I asked J'Vada to tell me what happened. I said, why couldn't you just, you know, get someone on your team to fulfill the—you know, Line 1, like Ham said, Line 1 is the key. If Line 1 and 2 don't run, that makes the money of the building. It doesn't matter if the other lines are slow. So we have an obligation.
>
> She said, well, Chris could have done it. You know, he tells somebody else to tell me, you know, to get somebody to do it. I said, that's your responsibility as a team lead; we direct. You know, you're part of the leadership. So that's what we do, we lead.

[9] Pearson is a partner in the Fisher & Phillips law firm which represented Respondent in this proceeding. Fisher & Phillips did not represent Respondent during the two election campaigns. Another law firm represented Respondent in settling other unfair labor practice charges in 2017, G.C. Exh. 3.

[10] It is not clear in what form the proposed discipline was presented to Shaffer. It could have been G.C. Exh. 5, but there is no testimony that this was the case.

[11] Jarrett now has Roberts' job. In April and May 2017, she reported to Roberts.

[12] Roberts conducted the meeting on May 5 because Jarrett was not at the facility.

Tr. 450.

I find this testimony does not accurately reflect any conversation Jarrett had with Mason or Roberts. Mason was not responsible for supplying line 1 and Fair never asked her to supply line 1. Fair never told Jarrett that Mason was insubordinate with regard to line 1, which was the responsibility of team lead James Allen; not Mason.

Jarrett did not credibly explain in this proceeding or elsewhere why Mason's misconduct warranted termination while the insubordination of other employees, set forth below, did not. Jarrett testified that she submitted her recommendation to Jonathan Pearson. Jarrett then testified that it, "was processed," Tr. 452.

Leola Roberts testified that Jarrett's report was vetted by David Smith, Respondent's Vice President of Human Resources and Tim O'Rourke, an Electrolux in-house attorney.[13] Smith had been the interim human resources director at this Memphis facility, apparently from sometime before August 2016 up until or prior to February 2017 when Roberts was hired, G.C. Exh. 10, Tr. 435. Any input from Smith regarding Mason's termination did not constitute legal advice.[14] There is no evidence regarding the review of Jarrett's recommendation or any deliberations regarding her recommendations by Pearson, Smith, O'Rourke or anyone else. There is no evidence as to whether any of the "vetting" occurred before Jarrett recommended termination. There is no evidence as to whether Jarrett communicated with Pearson, O'Rourke or Smith after her meeting with Mason on April 28—other than to submit the statements she received from Fair.

Leola Roberts, then Respondent's human resources director, testified that Diane Jarrett discussed the findings of her investigation with Roberts. Jarrett testified this occurred late in the day on April 28. It is unclear as to who made the final decision to terminate Mason and on what basis, Tr. 494. It appears from Paul Shaffer's uncontradicted testimony that a final decision to terminate Mason was not made until May 1 at the earliest and possibly as late as May 5.

Jarrett's testimony that Mason terminated because she disrupted Respondent's operation is not credible. First of all, the testimony of Mason and Chris Fair establish that the assembly lines stopped running on April 28 for reasons unrelated to Mason's failure to bring microwaves to line 2, Tr. 197, 354-55. None of the affidavits made or collected by Fair on April 28 indicate that Mason's misconduct had any impact of production, G.C. Exh. 11. Secondly, the fact that Respondent waited a week after the insubordination to terminate Mason is an indication that Respondent did not consider her misconduct to be particularly serious. This is also an indication that Respondent did not distinguish Mason's case from other employees guilty of similar misconduct on the grounds that she was a team leader. Respondent's interim agreement with the Union,

[13] O'Rourke is deceased. His name is incorrectly rendered as O'Rourk in the transcript.

[14] It is also not clear the vetting by Pearson and/or O'Rouke constituted legal advice.

R. Exh. 6 allowed the company to immediately suspend Mason for a serious violation other than one involving violence, weapons or drugs.

At the time of Mason's termination, Respondent's rules on conduct & disciplinary action were contained in its employee handbook, Exh. G.C. – 12 at pages 49-52. Respondent has a progressive discipline policy. Generally an employee is not terminated until they commit a 4th policy violation following a documented verbal counseling, a written warning, a suspension without pay plus a final written warning.[15] The handbook lists a number of types of misconduct that "may result in disciplinary action, up to and including termination of employment." Among these is insubordination (i.e. refusing to follow legitimate instructions of a superior directly related to performance of one's job). There is no evidence that Respondent terminated Mason as a result of its progressive discipline policy.

The record shows that Respondent has disciplined a number of employees for insubordination without terminating them.[16] Respondent appears to contend that it is improper to rely on the disciplinary records it produced pursuant to the General Counsel's subpoena because they were not authenticated by a witness, R. Brief at 44. However, Respondent did not introduce any evidence questioning the authenticity of these documents—despite my repeated offer to consider any such evidence. I find that G.C. Exhibits 13-19 are authentic pursuant to Federal Rule of Evidence 901 and are admissible and probative, *Alexander's Restaurant and Lounge,* 228 NLRB 165, 168 n. 6 (1977); enfd. 586 F.2d 1300 (9th Cir. 1978). Indeed, Respondent in producing these documents in response to the General Counsel's subpoena implicitly authenticated them, *United States v. Brown,* 688 F.2d 1112, 1116 (7th Cir. 1982).

Rule 901 states that authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims. By way of illustration the rule provides examples of authentication conforming to the requirements of the rule. Relevant to this case are examples (4) distinctive characteristics—in this case disciplinary records on Electrolux letterhead, signed by Electrolux managers and (9) Evidence of an Electrolux process or system. With regard to example (4) I would note that R. Exh. 2, a disciplinary form introduced by Respondent, looks very much like G.C. Exhs. 14-19.

[15] On its face, the handbook appears to call for termination regardless of how long in the past prior violations occurred.

[16] The evidence that Respondent has not taken disciplinary action against other employee-members of the union negotiating committee is irrelevant to the issue of whether it discriminated against Mason. It is well established that an employer's failure to take action against all or some other union supporters does not disprove discriminatory motive, otherwise established, for its adverse action against a particular union supporter, *Master Security Services,* 270 NLRB 543, 552 (1984); *Volair Contractors, Inc*., 341 NLRB 673, 676 fn. 17 (2004); *NLRB v. W.C. Nabors Co.*, 196 F.2d 272 (5TH Cir. 1952); cert. denied 344 U.S.865 (1952), *CNN America, Inc.,*361 NLRB 439, 500 (2014); 362 NLRB No. 38 (2015) , affd. in relevant part, *NLRB v. CNN America,* 865 F.3d 740 (D.C. Cir. 2017).

The evidence that Mason was treated disparately is as follows:

G.C. Exh. 13: An employee, who previously had been repeatedly insubordinate, was verbally counseled for another instance of insubordination on January 12, 2015. He was then suspended for 5 days for leaving a mandatory meeting without permission on February 19, 2016. On February 25, 2016, after several additional instances of insubordination, Respondent terminated the employee.[17]

G.C. Exh. 14: An employee was given a 5-day suspension on May 1, 2018 for being unwilling to perform tasks assigned by her supervisor. Although characterized as "inappropriate behavior," the misconduct is clearly insubordination as well.

G.C. Exh. 15: An employee was disciplined short of termination or suspension on September 21, 2015 for insubordination and job abandonment.

G.C. Exh. 16: An employee was given a written warning on September 8, 2016 for texting on her cellphone while riding a piece of equipment. She continued to do so after being told by a supervisor that she could not text and drive equipment. On November 7, 2016, she received a 5-day suspension for failing to follow instructions on closing all work orders that she delivered to the assembly line. Respondent fired this employee on December 12, 2016 for refusing to cooperate with an external auditor. The auditor was reviewing discrepancies caused by the employee's failure to follow proper inventory scanning procedures on November 19.

G.C. Exh. 17: An employee was given a written warning on July 8, 2014, for ignoring his supervisor's instructions as to when to go to lunch on several occasions. The same employee received a 5-day suspension on November 9, 2016 for insubordination. This employee refused to set equipment when asked to do so by his supervisor.

G.C. Exh. 18: On January 12, 2017, an employee received a verbal counseling for insubordination. The employee refused to run her press because she believed she was entitled to a rest break. 15 minutes of production time was lost as a result.

G.C. Exh. 19: On July 11, 2016 an employee was given a 5-day suspension for insubordination, i.e., refusing his supervisor's request to relieve a press operator during a 5 minute break. This employee had received a written warning for poor job performance a month or two earlier.

Respondent argues at page 45 of its brief that even if admissible these documents do not permit an inference of disparate treatment. First of all, Respondent argues that these documents do not indicate whether or not the employees disciplined less severely were engaged in union or other protected activity similar to that of Mason. In fact, these records, in the absence of evidence to the contrary, do show that at least

[17] This employee received lost wages for his one-week suspension pursuant to a settlement agreement, G.C. Exh. 3. He apparently was not reinstated.

some of these employees did not engage in union activity similar to that of Mason. Less severe discipline with regard to the employees in G.C. Exhs. 13, 15, 16, 17, 19 was imposed prior to the certification of the Union on October 5, 2016. Some of this less severe discipline was also imposed prior to the filing of the Union's second representation petition in the summer of 2016 and some even prior to the first representation election in May 2015. In no instance has Respondent established that it terminated an employee, who was not a union activist, for a first instance of insubordination.[18]

Analysis

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[19] Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

If a respondent's reasons are pretextual--either false of not actually relied on--the respondent fails by definition to meet its burden of showing it would have taken the action for those reasons absent the protected or union activity. See Pro-Spec Painting, Inc., 339 NLRB 946, 949 (2003). Moreover, a showing of pretext also supports the initial showing of animus and discrimination. See Wright Line, supra, 251 NLRB at 1088 n. 12, citing Shattuck Denn Mining Corp. v. NLRB 362 F.2d 466, 470 (9th Cir. 1966).

J'Vada Mason engaged in union activity, most notably her participation in the union's collective bargaining committee. Respondent was aware of Mason's participation on the union committee. The Union identified her to Respondent as a member of the committee by letter in January 2017. Management representatives also saw Mason at bargaining sessions between January and April 2017. Finally, Respondent's management was aware of Mason's attempt to contradict plant manager Gulka at a mandatory employee meeting just prior to the second election.

While there is only a little evidence that Diana Jarrett or Leola Roberts knew of Mason's union activities, Jonathan Pearson, Tim O'Rourke and David Smith, who participated in the decision to terminate Mason were aware of her presence at collective

[18] The fact that Mason was a team lead is irrelevant to the issue of disparate treatment. Respondent has not articulated this as a basis for treating Mason more harshly than other employees.

[19] *Flowers Baking Company, Inc.,* 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.,* 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB,* 70 F. 3d 863 (6th Cir. 1995).

bargaining negotiations. It is unclear as to who in management, besides plant manager Gulka, was aware of her conduct at the captive audience meeting.

Even assuming, as Respondent contends, that Jarrett and Roberts were the sole decision makers, I conclude that they were aware of Mason's union activities. I so conclude in part due to Respondent's failure to give any credible explanation for the disparate treatment of Mason as compared with other insubordinate employees.

Additionally, in its brief at page 32, Respondent acknowledges that knowledge of Mason's involvement with the negotiating committee can be imputed to Jarrett and Roberts. Moreover, both likely were aware of Mason's union activities through Erika Robey, then Respondent's labor relations manager at the Memphis plant. Robey reported directly to Leola Roberts, Tr. 376.[20]

Robey was on the company collective bargaining team and thus saw Mason at negotiating sessions. She attended the April 28 meeting with Mason, Jarrett, Chris Fair and others at which she took notes about what had occurred earlier that day regarding Mason's insubordination. Robey also took notes at the May 5 meeting at which Leola Roberts terminated Mason.[21] Testimony at transcript pages 24, 453 and 465 establish that Robey and Jarrett had a discussion prior to April 28 about complaints that Mason had raised at a negotiation session.[22]It defies credulity to believe that Robey, the plant labor relations manager, who was familiar with the events of April 28, played no role in the deliberations leading to Mason's termination.

Evidence of Animus and Causation

Mason's uncontradicted testimony establishes that Respondent harbored animus to at least some of her union activities, e.g., challenging management statements at a mandatory meeting just before the second election. Additionally, I infer animus from Respondent's inability to explain why she was terminated and other employees guilty of insubordination were not.

The National Labor Relations Board may infer discriminatory motive from the record as a whole and under certain circumstances, indeed not uncommonly, infers discrimination in the absence of direct evidence. When the Respondent's stated reasons for its actions are found to be false (i.e., "pretextual reasons"), discriminatory motive may be inferred. In turn, "pretext" is sometimes, if not often, inferred from a blatant disparity in the manner in which an alleged discriminatee is treated as compared with similarly situated employees with no known union sympathies or activities (i.e., disparate treatment), *Pontiac Care & Rehabilitation Center,* 344 NLRB 761, 767 (2005);

[20] Robey's name is incorrectly transcribed as Ruddy at Tr. 376-77.

[21] Robey left Respondent's employment in June 2017 and was not called as a witness by either party.

[22] Respondent did not produce Robey's April 28 , 2017 notes in response to the General Counsel's subpoena because it could not locate them, G.C. Exh. 21.

New Otani Hotel & Garden, 325 NLRB 928 fn. 2 (1998); *Fluor Daniel, Inc.,* 304 NLRB 970, 970-71 (1991); *Sears Roebuck & Co.,* 337 NLRB 443, 443-445 (2002); *Citizens Investment Services Corp.,* 342 NLRB 316, 330 (2004).

Given Respondent's failure to offer any explanation for the disparate treatment of Mason, I find that the reason for her discharge, i.e., insubordination on April 28, 2017, is pretextual. When the reason given for discipline or discharge is found to be pretextual, the causal relationship between the employee's protected activity and discipline or discharge may be inferred, *La Gloria Gas & Oil,* 337 NLRB 1120 (2002) affd. 71 Fed. Appx. 441 (5th Cir. 2003). I infer discriminatory motive in this case. I conclude that Respondent seized upon Mason's misconduct to retaliate against her because of her union activity, *Golden State Foods Corp.,* 340 NLRB 382, 384-86 (2003).

The General Counsel also alleges that Respondent discharged Mason in retaliation for protected concerted activity apart from her union activity. However, I find that Respondent did not violate the Act in terminating Mason due to alleged other protected activity (e.g., complaining about a pay disparity; protesting the posting of a bathroom sign-out log; protesting favoritism on the part of Larry McClendon, who was Chris Fair's supervisor; or complaining about Fair) . Assuming that alleged protected conducted was protected and concerted, the record is insufficient to establish that Respondent bore animus towards Mason as a result of that conduct or that it was related in any way to her termination.

Conclusion of Law

Respondent violated Section 8(a)(3) and (1) in discharging J'Vada Mason on May 5, 2017.

The Respondent, having discriminatorily discharged J'Vada Mason, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Respondent must also compensate J'Vada Mason for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010), *King Soopers, Inc.,* 364 NLRB No. 93 (2016), enforced in pertinent part 859 F. 3d 23 (D.C. Cir. 2017).

Respondent shall file a report with the Regional Director within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating J'Vada Mason's backpay to the appropriate calendar year(s), *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016). Respondent shall also compensate the discriminatee

for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC, d/b/a Tortillas Don Chavas,* 361 NLRB 101, 102 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Electrolux Home Products, Inc. its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the International Brotherhood of Electrical Workers Local 474 or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer J'Vada Mason full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make J'Vada Mason whole for any loss of earnings, search-for-work and interim employment expenses, and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Compensate J'Vada Mason for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating J'Vada Mason's backpay to the appropriate calendar year(s).

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify J'Vada Mason in writing that this has been done and that the discharge will not be used against her in any way.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Memphis, Tennessee facilities copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 5, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. July 2, 2018

Arthur J. Amchan

Arthur J. Amchan
Administrative Law Judge

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Brotherhood of Electrical Workers Local 474 (IBEW) or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer J'Vada Mason full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make J'Vada Mason whole for any loss of earnings less any net interim earnings, search-for-work and interim employment expenses (regardless of interim earnings) and other benefits resulting from her discharge, plus interest compounded daily.

WE WILL file a report with the NLRB's Regional Director, within 21 days of the date on which backpay if fixed, allocating J'Vada Mason's backpay to the appropriate calendar years.

WE WILL compensate J'Vada Mason for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of J'Vada Mason, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

ELECTROLUX HOME PRODUCTS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3413
(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-206187 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.